Conversations With...

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The Issue: Proposed Amendments to Federal Discovery Rules

In this edition of Washington Legal Foundation's CONVERSATIONS WITH, former Attorney General of the United States and Pennsylvania Governor **Dick Thornburgh** leads a discussion with former Colorado Supreme Court Justice **Rebecca Love Kourlis**, who is now Executive Director of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver, and **John J. Jablonski**, a partner with the law firm Goldberg Segalla. Advances in technology and the ubiquity of digitalized information have overtaken federal procedural rules governing pre-trial discovery. This reality, and the concomitant, costly increase in ancillary discovery disputes inspired a focused effort to amend the Federal Rules of Civil Procedure. The result: formal proposed amendments on which the public may now comment. Our participants discuss the current environment underlying the federal discovery reform effort; the proposed Rule changes; and whether, if adopted as proposed, the amendments will successfully address the problems perceived by many litigants and judges.

Governor Thornburgh: Becky, a survey IAALS and the American College of Trial Lawyers (ACTL) conducted in support of a joint 2009 report reflected that America's civil justice system is in "serious need of repair." How much have discovery-related burdens contributed to this situation?

Rebecca Love Kourlis: Discovery is a major culprit in cost-delay escalation. It can sometimes be the tail wagging the dog: driving costs and causing delay without shedding much light on the factual issues in the case. The results of the survey of ACTL Fellows support this. 92% said that the longer a case goes on, the more it costs. 85% thought that litigation in general and discovery specifically are too expensive. In fact, 87% agreed that electronic discovery, in particular, is too costly. Additional surveys over the past five years have continued to confirm that discovery–with the exception of trial, which is becoming more and more rare–is the most expensive and time-consuming aspect of litigation.

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Governor Thornburgh: John, from your perspective as a litigator, can the civil justice system be repaired without fixing the discovery process?

John Jablonski: No, I do not believe it can. The current system of discovery is the 800-pound gorilla in the room. When the Federal Rules were conceived, evidence in the vast majority of cases fit in a few file folders. Fast forward to today. The volume of potentially relevant electronically stored information (ESI) is staggering. A single litigant with an iPhone™, iPad™, and laptop has the storage capacity of over one hundred million printed pages. If a party has just ten similarly situated witnesses, there is a pool of potential evidence equivalent to one billion printed pages. As a society we create vast quantities of data daily. This means we need a complete paradigm shift. Without changing the purpose and scope of discovery, judges and litigants will never be able to keep up with the demands of litigation under the current Rules. Our system of discovery was never designed to deal with such staggering amounts of ESI. As a result, litigants are losing faith in the justice system. Fundamental reforms are necessary to cope with the staggering volume of information. Telling parties and their lawyers to cooperate is not going to fix the justice system. Tinkering with some rules will not fix systemic problems either. There must be a sea change in the way we approach discovery. To change the paradigm we need a three-pronged approach to discovery reform: (1) a national and uniform spoliation sanction approach; (2) a fair and practical revised scope of discovery; and (3) incentive-based cost default rules.

Governor Thornburgh: How did discovery, which is supposed to provide the means for litigating a claim, become an end unto itself? What makes it such a potent tactical weapon in litigation?

Mr. Jablonski: A convergence of factors has led to discovery being an end unto itself. Well-intentioned lawyers want to leave no stone unturned; the advent of the computer makes overly broad boilerplate demands easy to "cut and paste;" judges are reluctant to limit the scope of discovery; case law supports the broadest interpretation of what is discoverable; and the producer pays model in the United States provides no financial disincentive to a requesting party. In other words, on that final factor, your opponent bears the costs of production, so why not ask for the moon and stars. This allows for discovery to be used as a very potent tactical weapon. "We are going to bury you in discovery" is the battle cry.

Now add the transactional costs to collect, review, and produce the paper equivalent of millions of pages of ESI, and discovery becomes a lethal weapon. I have been involved in

countless cases where clients begrudgingly settle a claim rather than pay to respond to a deluge of discovery requests. Lawyers know the score. Cooperation and tinkering with the Rules is not going to disarm the weapon.

Governor Thornburgh: As a former trial judge and state Supreme Court justice, you've overseen discovery disputes, Becky. What role can judges play to reduce discovery burdens and abuses?

Justice Kourlis: At the trial level, judges can manage cases in a way that keeps costs under control and focuses the discovery on the real areas where there is a need for an exchange of information. This kind of management is occurring in the courtrooms of the best judges in the country, and the litigants are the beneficiaries of it. At the appellate level, the courts need to uphold that approach. As an example, last year the Colorado Supreme Court issued a very important opinion[1] upholding and encouraging a trial judge's obligation to manage cases and control costs. According to the opinion, under Colorado Rule of Civil Procedure 26(b)(1)—which mirrors its federal rule counterpart—when a dispute about the proper scope of discovery arises, "the trial court must determine the appropriate scope of discovery in light of the reasonable needs of the case and tailor discovery to those needs." While this obligation is not new, the opinion provides welcome appellate support for judges who are actively managing their cases to ensure proportionality.

Governor Thornburgh: The federal judiciary addressed e-discovery in 2006 by amending several of the Federal Rules of Civil Procedure to expressly include ESI. Do you think it is necessary just seven years later to amend the discovery rules again?

Mr. Jablonski: The 2006 amendments never addressed the real problems inherent in the system. The Advisory Committee on Civil Rules avoided addressing the tough policy questions needed to confront existing discovery problems, which in turn were complicated by ever-expanding volumes of ESI. Instead, the Committee made incremental changes that are not working and are in some respects adding to the problem. At the time, it was thought that forcing litigants to discuss e-discovery in Rule 26(f) meetings and requiring judges to address e-discovery issues during Rule 16 conferences would lead to better management of costs and scope of e-discovery. Well, it hasn't. Saying education about e-discovery is the answer still does not address the problems inherent in the system. Some very sophisticated "innocent" litigants are dealing with very real spoliation threats. Without a paradigm shift in the system's approach to discovery, all the cooperation in the world cannot drive down costs or disarm the use of discovery as a weapon.

[1] *In re: DCP Midstream, LLP v. Anadarko Petroleum Corporation, et al.*, Colorado Supreme Court, June 24, 2013, available at: http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2012/12SA307.pdf.

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Moreover, the most controversial measure of 2006, the Rule 37(e) "safe harbor," never took hold. Compounding the problem, the Committee Note to the Rule was interpreted as requiring litigants to turn off auto-delete features as part of preservation because "[a] party cannot exploit the routine operation of an information system to evade discovery obligations by failing to prevent destruction of stored information that it is required to preserve." By failing to account for the reality that laptops go missing and emails get deleted, litigants must contend with the threat of spoliation sanctions by taking extraordinary steps to preserve everything remotely related to a controversy. A patent infringement suit from the U.S. District Court for the Northern District of California, *Apple v. Samsung*, comes to mind. The court there ultimately ordered adverse inference charges for *both* parties because of alleged preservation failings.

Governor Thornburgh: The Civil Rules reform process is quite different from the process of legislative or even regulatory change. Becky, can you explain briefly how it works and who is directly involved in drafting the amendments?

Justice Kourlis: Across the country, in the federal and state systems, the Rules of Civil Procedure are the province of committees that make proposals to their respective Supreme Courts. Those committees consist of judges, lawyers and academics. So, the process is necessarily somewhat "inside baseball." On the other hand, in some states, the rules process is fairly nimble and responsive to good ideas. Particularly at the state level, the Supreme Courts are increasingly interested in new ways of doing things—in an effort to assure a more just, speedy, and inexpensive civil justice system. At the federal level, the process is more ponderous—but then again, the rules apply to every federal case across the nation so the need for buy-in is much greater. Further, the rules are not the only way in which change is occurring. Judges in courtrooms across the nation can make a big difference, even without rules changes, by managing their cases more effectively. And, in turn, a change in attorney culture will have to be part of the ultimate solution.

Governor Thornburgh: Let's go through some of the proposed amendments. What changes have been proposed to Rule 26, which governs what is discoverable?

Mr. Jablonski: The proposed amendment to Rule 26(b)(1) would redefine the scope of discovery to be "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…." The amendment would strike the well-known phrase, "[r]elevant information need not be admissible at the trial if the discovery appears

reasonably calculated to lead to the discovery of admissible evidence." By eliminating this phrase, this amendment is designed to narrow the current scope of discovery. In 1983 the Committee added Rule 26(b)(2)(c)(iii), requiring judges to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Greater emphasis is given to this "proportionality" requirement in the proposed amendments by moving this phrase directly into Rule 26(b)(1).

Governor Thornburgh: Becky, the IAALS/ACTL report makes a "radical" proposal for reducing the amount of discovery. Do the Rule 26 amendments move toward the goal of that proposal?

Justice Kourlis: The IAALS/ACTL report proposed 29 principles for the improvement of the civil justice system, including that proportionality should be the most important principle applied to all discovery. The proposed amendments do move toward the goal of our proposals by redoubling attention on this concept of "proportionality," which was in the Rules before but buried and ignored. The notion is that the whole process of a case, and discovery in particular, will be proportional to the dispute. So, the easy example is that a case involving $200,000 at issue will not spin off $500,000 worth of discovery.

Governor Thornburgh: Can the proposed amendments to Rule 26 be improved, John?

Mr. Jablonski: Absolutely. Using history as a guide, simply moving proportionality into the scope of a discovery rule will fail to bring about a paradigm shift. Proportionality has been in the Rule since 2000 and is rarely invoked to limit the scope of discovery. Along with proportionality, Rule 26(b)(1) was amended in 2000 in an effort to narrow the scope of discovery by limiting it to "claims or defenses." This was ignored and failed to produce a new mindset among the bench and bar. We must change the mindset, or the proposed amendment will suffer the same fate.

To mitigate the very real risk that deeply entrenched customs and practices will continue to trump the actual scope of discovery carefully spelled out by the new rule, a materiality requirement should be added. This could be accomplished by simply defining the scope of discovery as "any non-privileged matter that is relevant and *material* to any party's claim or defense." Improving the rule in this manner will serve as a real shift in the scope of discovery and may finally bring about a narrowing of the scope of discovery called for by the bench and bar since 1946.

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Governor Thornburgh: What amendments have been proposed regarding sanctions for failing to preserve discoverable information, and why are they needed?

Justice Kourlis: The current Rule 37(e) "safe harbor" provision limits sanctions for failure to preserve where the loss of electronically stored information resulted from the "routine, good faith operation of an electronic information system." While the rule was originally intended to ease concerns regarding preservation of electronically stored information, uncertainty and a lack of uniformity in the area of preservation persist. Moreover, the burden of preservation, and the impact of a lack of uniformity across the country regarding preservation obligations, is only becoming magnified as more and more records are kept electronically.

These concerns were raised at the "Duke Conference" in 2010, spurring discussion and an effort on the part of the Federal Civil Rules Committee to propose amendments to address such concerns. The proposed amendments to Rule 37(e) would make the rule apply to all forms of discoverable information and would limit sanctions to those occasions where the failure to preserve caused "substantial prejudice" and was caused by "willful" or "bad faith" misconduct, or where such actions "irreparably deprived" the other party of "any meaningful opportunity to present or defend against the claims in the litigation." The Rule also provides for "remedial and curative" measures where there has been a failure to preserve, regardless of any level of culpability. In short, the Rule is an attempt to provide litigants with some assurance that they will not be sanctioned for loss of documents where the loss was not the result of bad faith or willful misconduct. That assurance is much needed.

Governor Thornburgh: Some lawyers have already raised concerns about the Rule 37(e) amendments. We'll address two here. First, what are the concerns with the culpability standard for imposing sanctions?

Mr. Jablonski: One major concern is the use of the disjunctive—"willful or in bad faith"—because conduct that is merely willful does not necessarily spring from a desire to suppress the truth. A "willfulness" standard, by itself, should not be enough to establish the requisite state of mind for the imposition of sanctions. It is important to note that spoliation sanctions punish destruction flowing from a litigant's intent to keep evidence out of the hands of an opponent or the court. As demonstrated by Judge Scheindlin's recent ruling in *Sekisui Am. Corp. v. Hart*,[2] some judges will not hesitate to impose sanctions if the rule can plausibly be read to permit it. Judge Schiendlin held that "[t]he culpable state of mind factor is satisfied by a showing that the evidence was

[2]2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013).

destroyed knowingly, even if without intent to [breach the duty to preserve it], or negligently.") Keeping willfulness as a standard, without culpability, will undermine the proposed rule's goal of deterring intentional wrongdoing.

The other major concern is that the "irreparably deprived" exception discussed by Justice Kourlis contains no culpability standard. The exception was crafted to codify a very narrow "one-in-a-million" line of cases involving the loss or destruction of *the* key piece of evidence. The exception will essentially "swallow the rule" by inviting courts to impose sanctions in cases where willfulness or bad faith cannot be established. Experience suggests that judges and litigants alike will soon come to view the exception as a convenient way to circumvent establishing "bad faith." The entire purpose of sanctions is to punish bad actors and deter nefarious conduct. Absent intentional misconduct, there should be no authority for the imposition of harsh sanctions on an otherwise innocent or merely negligent party. Sanctions should issue based on culpability, not on a judge's highly individualized interpretation of "irreparably deprived." By trying to cover the rare instance when a key piece of evidence is lost, the drafters have crafted a dangerous loophole.

Governor Thornburgh: Another concern is Rule 37(e)'s lack of a clear trigger for when litigants must preserve information. Can you explain that concern and what further changes to the amendments may be needed?

Mr. Jablonski: The proposed rule lacks a clear, bright-line trigger that precisely informs litigants when they are under an affirmative duty to preserve evidence. By failing to create a clear line, an opportunity is being missed to establish a clear national preservation standard. One of the biggest problems stakeholders demonstrated at the Duke Conference was the costly practice of over-preservation. Over-preservation is the direct result of a "gotcha" game. The game is played by seeking sanctions for missing documents outside the scope of preservation undertaken long before a lawsuit is filed. If a litigant guesses wrong on the scope of preservation, gotcha–sanctions. The proposed Rule change will do nothing to eliminate the guesswork undertaken out of fear of sanctions. Its current "anticipation of litigation" standard will require weighty preservation decisions to be made without the benefit of the scope of discovery provided by the pleadings.

Likewise, prior to litigation there is neither an opposing counsel to negotiate the scope of preservation, nor a judge to resolve disputes about preservation. Changing the proposed rule to adopt a decisive and clear-cut "commencement of litigation" standard triggered by the filing of a complaint would provide much-needed

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certainty for litigants. Such a bright-line rule will help to set uniform expectations while preserving a party's ability to prove or defend any claim. Courts will be empowered to focus on the merits of claims, rather than focusing on ancillary litigation about the date a duty to preserve was triggered or examining the scope of preservation efforts undertaken years before litigation was commenced. A commencement trigger will also have the immediate benefit of eliminating vast amounts of costly over-preservation, which now takes place in tens of thousands of potential claims that are never filed.

Governor Thornburgh: An amendment has also been proposed to Rule 1, which heretofore had been seen as solely aspirational and not a rule that imposes duties on judges or litigants. Does this proposal change that, John?

Mr. Jablonski: There is a real danger that Rule 1 will be transformed from aspirational to actionable–imposing ambiguous duties on litigants. The incorporation of "parties" directly into the rule provides an inappropriate opportunity to game the system. Attorneys could file motions under Rule 1 claiming that the actions of opposing counsel have failed to secure the goals of the rules. As with the first version of Rule 11, history shows that arming adversaries with additional pathways to motion practice will likely spur wasteful motions and burden the courts in unanticipated ways. The rule itself provides no guidance as to when or at what point pretrial proceedings have fallen short of the rule's goals. This is an open invitation for mischief. For the defendant who may feel wrongly sued, no trial is sufficiently "inexpensive." For either party, any form of discovery that will cost money, time, or resources, even if it is permitted and warranted under the Rules, could be viewed as insufficiently inexpensive or just. It is not difficult to imagine a scenario where an opponent could deem ordinary discovery as falling into this category. Since 1938, Rule 1 has represented the aspirational expression of the goals of the Federal Rules of Civil Procedure and has not been construed to impose any affirmative duty on parties or their lawyers. This seemingly minor change is unwarranted and could change that.

Governor Thornburgh: Does the amendment package propose any changes with regards to limiting or shifting the costs of discovery?

Justice Kourlis: The package proposes changes intended to limit the costs of discovery, but not shift them.

Governor Thornburgh: Even if the current proposal is adopted in some form, can discovery be adequately reformed without further efforts to address costs? Do you expect the Judicial Conference to consider such changes in the future?

Justice Kourlis: It is my understanding that there is a committee that will begin to wrestle with the questions associated with cost-shifting this year. I would expect that at some point that committee will tender proposals for rules changes to the Standing Committee–perhaps in 12 to 18 months.

Governor Thornburgh: With my earlier question in mind, Becky, do the proposed Rules amendments provide judges with more or better tools to manage discovery?

Justice Kourlis: The proposed amendments *do* provide judges with better management tools. I stress, again, however that the judges need to live up to their side of the bargain by focusing attention on the case(s) and working with the attorneys to achieve proportionality in a fair and cost-effective way—and by enforcing their orders when and as necessary.

Governor Thornburgh: Do you expect substantial opposition to the Rules amendments?

Mr. Jablonski: I do. I think people, and lawyers in particular, do not react well to change. Litigants have been calling for a narrowed scope of discovery for more than 40 years. With each incremental tweak of the rules, the scope of discovery has remained exceptionally broad. I feel like a history teacher today, but incremental changes have simply not worked to rein in the costs and burdens of discovery. The proliferation of technology and ever-growing volume of ESI serves merely to shine a bright light on systemic problems. Other symptoms of the problem include the near extinction of civil trials, reliance on alternative dispute resolution, litigants choosing foreign jurisdictions, and preservation sanctions. We live in an age that has been transformed by technology. More evidence than ever exists. Yet some judges have focused on punishing litigants for a few missing emails rather than the vast volume of ESI still available to the litigants. If the civil justice system and its stakeholders do not adapt to address the exorbitant costs and burdens associated with preservation and discovery, we have failed.

Governor Thornburgh: Large U.S. corporations and their outside counsel have been quite engaged in the Rules reform process. John, why should mid-sized and smaller businesses review and comment on what's been proposed?

Mr. Jablonski: Mid-sized and smaller businesses have much more at stake than large U.S. corporations. A preservation battle could bankrupt their businesses. Frankly, they cannot afford to stand on the sidelines. A small "mom and pop" company with a basic server and a few computers is storing billions of pages of documents. When I discuss preservation and discovery requirements with

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small business owners, their reaction is frustration and disbelief over the costs and burdens. They feel that the justice system is priced out of their reach. Often decisions are made to settle or abandon a claim when a small business learns of the costs involved. It is really unfortunate. The federal courts should be the premier forum for dispute resolution, not just a forum for litigants with large war chests.

Governor Thornburgh: A question for you both—if these amendments are adopted, how much of an impact do you think they will have on the discovery process and the larger U.S. civil justice system?

Justice Kourlis: Rules are a step toward change, but they are insufficient by themselves. The Rules must be followed by the lawyers and—when necessary—enforced by the judges. If these amendments are adopted, I do think they will have an impact on shifting the legal culture toward a more effective civil justice system, provided that the judges and lawyers pay attention to them.

Mr. Jablonski: I think there is a tremendous opportunity for a significant impact, if the amendments are modified to better narrow the scope of discovery, eliminate a few loopholes in proposed Rule 37(e) and set a clear, bright-line commencement preservation trigger. Justice Kourlis is right; if adopted as proposed the legal culture *may* move toward a more effective civil justice system. But as we discussed, incremental change, more education, and mandating cooperation is not enough. We know, because of the failure of the 2006 amendments. We are very close to shifting the paradigm, but a shift will not take place absent clear, uniform guidance that could be provided with a few changes to the proposed amendments.

Governor Thornburgh: The public comment process is open for six months, correct? What happens after that?

Mr. Jablonski: Correct. The public comment period closes on February 15, 2014. After that, based on comments from the bench, bar, and general public, the Advisory Committee may then choose to discard, revise, or transmit the amendments as contemplated to the Standing Committee. The Standing Committee independently reviews the findings of the Advisory Committee and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, officially promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules. It is unlikely that the proposed amendments will work their way to the Supreme Court by May 1, 2014, so

the earliest we may see these amendments enacted is December 1, 2015.

Governor Thornburgh: Where can interested parties get information about the Rules amendment proposal and where can they comment?

Mr. Jablonski: Information about the proposal and how to comment is available at the U.S. Courts' website:

http://www.uscourts.gov/
RulesAndPolicies/rules/
proposed-amendments.aspx

Governor Thornburgh: Becky, John, thank you for participating in this project.

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The Honorable Dick Thornburgh is a former Attorney General of the United States, two-term Governor of Pennsylvania, and Under-Secretary-General of the United Nations. He is currently Of Counsel to the law firm K&L Gates LLP and Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

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